

GREGORY TODD BUTLER
Partner
(601) 362-9366
butlert@pbelps.com

July 10, 2019

#33303-0001

VIA U. S. MAIL & FAX

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201
facsimile: (803) 734-1839

RECEIVED
JUL 10 2019
SC Court of Appeals

Re: Carla Denise Garrison and Clint Garrison v. Target Corporation;
Appellate Case No. 2017-000267

To Clerk of the Court:

Pursuant to Rule 208(b)(7), I write to bring a supplemental authority to the Court's attention that was not available at the close of briefing or at the time oral argument was heard in this case. The supplemental authority is *Baruch v. Starwood Hotels & Resorts Worldwide, Inc.*, Case No. 18-1997 (4th Cir. July 10, 2019), a case recently decided by the United States Court of Appeals for the Fourth Circuit. A copy of the decision is attached for the convenience of the Court and counsel opposite.

In *Baruch*, the Fourth Circuit reversed the district court's grant of summary judgment in a needle-stick case on the question of constructive notice. *Baruch* speaks to the argument advanced in Target's cross appeal here. The parties' discussion of constructive notice appears on the following pages of the final briefs: Pages 16-27 of Target's principal brief, pages 14-30 of the Garrisons' response brief, and pages 1-16 of Target's reply brief.

Thank you in advance for passing this supplemental authority along to the Panel of Judges deciding this appeal.

Sincerely,

PHELPS DUNBAR LLP

G. Todd Butler

G. Todd Butler

cc: All counsel of record
Enclosure

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-1997

DONALD BARUCH; EMILY BARUCH,

Plaintiffs - Appellants,

v.

STARWOOD HOTELS & RESORTS WORLDWIDE, INC., d/b/a Westin
Alexandria; MARRIOTT INTERNATIONAL, INC., d/b/a Westin Alexandria;
ALEXANDRIA TOWERS INVESTORS, LLC; HOST HOTELS & RESORTS,
INC.; WESTIN HOTEL MANAGEMENT LP,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at
Alexandria. Claude M. Hilton, Senior District Judge. (1:18-cv-00028-CMH-TCB)

Submitted: May 29, 2019

Decided: July 10, 2019

Before HARRIS and QUATTLEBAUM, Circuit Judges, and DUNCAN, Senior Circuit
Judge.

Vacated and remanded by unpublished per curiam opinion.

Ashley E. Strandjord, CHASENBOSCOLO INJURY LAWYERS, Greenbelt, Maryland,
for Appellants. Julia B. Judkins, BANCROFT, MCGAVIN, HORVATH & JUDKINS,
P.C., Fairfax, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Donald Baruch (“Donald”) and his daughter, Emily Baruch (“Emily”) (collectively, “the Baruchs”), appeal the district court’s order granting summary judgment on their negligence action against the owners and operators of the Westin Alexandria hotel (collectively, “the Hotel”) in Alexandria, Virginia. The instant dispute arose after Emily was stuck in her buttock by the tip of a hypodermic needle found under the covers of her hotel bed shortly after checking into her room. The district court concluded that, because the Baruchs failed to show that the Hotel was on constructive notice that the needle was in Emily’s bed, the Hotel was entitled to judgment as a matter of law. For the reasons that follow, we vacate and remand.

“We review de novo a district court’s grant or denial of a motion for summary judgment, construing all facts and reasonable inferences therefrom in favor of the nonmoving party.” *Gen. Ins. Co. of Am. v. U.S. Fire Ins. Co.*, 886 F.3d 346, 353 (4th Cir. 2018). The moving party bears the initial burden of “‘show[ing] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)). If the movant makes this showing, the burden shifts to the nonmoving party to establish “a genuine issue of material fact for trial by offering sufficient proof in the form of admissible evidence.” *Id.* (ellipses and internal quotation marks omitted). However, “where the movant fails to fulfill its initial burden of providing admissible evidence of the material facts entitling it to summary judgment, summary judgment must be denied,” regardless of the sufficiency of the nonmoving

party's evidence. *Ray Comme'ns, Inc. v. Clear Channel Comme'ns, Inc.*, 673 F.3d 294, 299 (4th Cir. 2012) (internal quotation marks omitted).

In Virginia, "[t]he elements of an action in negligence are a legal duty on the part of the defendant, breach of that duty, and a showing that such breach was the proximate cause of injury, resulting in damage to the plaintiff." *Blue Ridge Serv. Corp. v. Saxon Shoes, Inc.*, 624 S.E.2d 55, 62 (Va. 2006). Here, the parties dispute the appropriate standard of care and whether the Hotel breached the duty it owed to the Baruchs.

Innkeepers, such as the Hotel, owe "an elevated duty of care" to their guests and, as a result, "will be held liable for the slightest negligence which human care, skill and foresight could have foreseen and guarded against." *Taboada v. Daly Seven, Inc.*, 626 S.E.2d 428, 434 (Va. 2006) (internal quotation marks omitted). Under the theory of constructive notice, an innkeeper can be held responsible for a "defect that has existed for such a period of time that the defect could have been discovered by the exercise of ordinary care." *City of Richmond v. Holt*, 563 S.E.2d 690, 694 (Va. 2002). The Baruchs, as plaintiffs, bore the burden of proving constructive notice. *Revell v. Deegan*, 65 S.E.2d 543, 546 (Va. 1951). And while constructive notice cannot be established by "pure speculation and conjecture," *Great Atl. & Pac. Tea Co. v. Berry*, 128 S.E.2d 311, 3134 (Va. 1962), it can "be shown by circumstantial evidence," *Appalachian Power Co. v. Sanders*, 349 S.E.2d 101, 105 (Va. 1986).

Viewed in the light most favorable to the Baruchs, the evidence developed during discovery established that, within roughly five minutes of entering her hotel room, Emily climbed into her bed and was pricked by a needle located underneath multiple layers of

bedding. These facts indicate both that Emily had little time to disturb the bed before finding the needle and that the needle was likely undetectable to her until Emily pulled back the covers. In addition, there is no evidence that anyone accessed the room after the Hotel housekeeper cleaned the room and before Emily arrived. Accordingly, a jury could reasonably infer that the needle was in the bed at the same time the housekeeper was readying the room and, therefore, that the housekeeper should have discovered it when changing the sheets.¹ In other words, a reasonable jury could find that the Hotel had constructive notice of the needle in Emily's bed.

As to whether the record contains evidence that the Hotel breached its duty of care, the Hotel employs a logical fallacy, essentially asserting that because the housekeeper cleaned Emily's room, the room was necessarily clean. The very presence of the needle in Emily's bed, however, raises a genuine issue of material fact as to how clean Emily's room actually was. And although the Hotel touts its robust cleaning regimen, the otherwise spotless condition of Emily's room, and the absence of any other complaints from the Baruchs during their stay, the Hotel fails to demonstrate that a jury could not reasonably find that the failure to detect and remove a sharp, dangerous object from a hotel guest's bed constitutes a breach of the innkeeper's duty of care. Based on

¹ The Hotel focuses on the lack of evidence demonstrating how the needle found its way into Emily's bed. However, to prevail, the Baruchs did not need to establish the source of the needle or a timeline of its movements; rather, they merely had to show that the needle was sufficiently noticeable and present in the bed long enough for the Hotel to discover it. *See Holt*, 563 S.E.2d at 694.

this record, a reasonable factfinder could conclude that the Hotel breached its duty by failing to remove the hypodermic needle nestled in the sheets of Emily's made bed.²

Accordingly, because the Hotel failed to discharge its initial summary judgment burden and genuine issues of material fact remain unresolved, we vacate the district court's grant of summary judgment and remand for further proceedings. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

VACATED AND REMANDED

² The Hotel does not contest that the needle injured Emily, nor does the Hotel dispute that the needle pricked Donald as he went to help Emily immediately after the incident.

Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605

RECEIVED
JUL 10 2019
SC Court of Appeals

South Carolina Court Administration
1220 Senate Street, Suite 200
Columbia, South Carolina 29201

FAX COVER SHEET

TO	
COMPANY	
FAX NUMBER	18037341839
FROM	Josh Hawkins
DATE	2019-07-10 18:40:40 GMT
RE	Appellate Case No. 2017-000267

COVER MESSAGE

Dear Clerk:

Please find attached scans of a letter and supplemental authority in Appellate Case No. 2017-000267. Paper copies are in today's mail to the Court of Appeals and Court Administration, and we will provide copies to opposing counsel.

Best regards,

David Schroeder

David Schroeder, PhD
Certified Paralegal
Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605
p: (864) 275-8142
f: (864) 752-0911

RECEIVED
JUL 10 2019
SC Court of Appeals